No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION,
Appellee.

APPELLANT'S REPLY BRIEF.

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I.
SUMMARY OF ARGUMENT.

The position of appellant Jefferson Savings and Loan Association ("Jefferson"), briefly stated, is as follows: The District Court found that under the terms of the Loan Participation Agreement ("LPA"), when Lifetime Savings and Loan Association ("Lifetime") sold, without Jefferson's consent, properties subject to the LPA acquired through foreclosure, Jefferson was entitled to an immediate payment of 75% of the selling price less a pro rata share of the costs and expenses of sale—*i.e.*, "75% of the net sales proceeds obtained for such property by Lifetime." [C. T. p. 213, lines 25-26]. Since Lifetime sold, without Jefferson's written consent, the five properties involved in Count II of the Complaint which were subject to the LPA and which had been acquired through foreclosure, Jefferson was

entitled to an immediate payment of 75% of the selling price of $37,087.50 less costs and expenses of sale of $325.85, or $31,099.15.

The District Court, however, arbitrarily and without justification awarded Jefferson not 75% of the selling price of $37,087.50 but, rather, 75% of $31,099.15—*i.e., 75% of 75%* of the selling price. The explanation for this anomalous decision is found in the following finding:

> "16. On August 25, 1964, Lifetime stated to Jefferson in writing that the latter would receive 75% of $31,099.15 in connection with the subject five (5) loans in the event that the Durhams took advantage of the 90 day purchase price on the eleven parcel agreement (Exhibit 11 in evidence). *By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties greater than 75% of $31,099.15, or $23,324.36.*" [C. T. p. 208, line 32, to p. 209, line 9; emphasis added].

Jefferson believes that the District Court's finding that it is "estopped" because of something upon which *it* supposedly relied is erroneous, and wholly unsupported by any evidence, and that the judgment should be modified to increase its award to 75% of the selling price of $37,087.50, less its pro rata share of the costs and expenses of sale, or $31,099.15.

In attacking Jefferson's position, Lifetime advances four basic contentions:

(1) That in finding that Jefferson was "entitled to an immediate payment of 75% of the *net sales proceeds* . . . obtained for such property by Lifetime" when Lifetime sold, without Jefferson's consent, properties subject to the LPA acquired through foreclosure, the District Court did not, in fact, mean that Jefferson was entitled to the payment of 75% of the selling price, less a pro rata share of the costs and expenses of sale (Appellee's Brief, pp. 3-4);

(2) That the District Court intended for its interpretation of the LPA to apply only *in futuro* and not to the existing controversy stemming from the parties' dsagreement as to the meaning of the LPA which was the subject of Count II (Appellee's Brief, pp. 6-7);

(3) That the basis for the District Court's decision was an estoppel against Lifetime (Appellee's Brief, pp. 11-12);

(4) That because Jefferson introduced Exhibit 11 into evidence, it is estopped to controvert its terms (Appellee's Brief, pp. 12-16).

Jefferson submits that none of these arguments are valid.[1]

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[1]Significantly absent from Lifetime's treatment of these arguments is any substantial effort to predicate them upon the evidence before the District Court. Rather, Lifetime takes a bootstrap approach in which it strains to discover discrepancies between Appellant's argument before the District Court and its position on this appeal. As Appellant demonstrates hereafter, such alleged discrepancies have absolutely no bearing upon the disposition of the issues with which this Court is presented.

II.
ARGUMENT.

1. Lifetime's Purported Distinction Between "Selling Price" and "Net Proceeds of Sale" Is Untenable.

There are several answers to Lifetime's contention that the District Court did not really mean that the LPA required Lifetime to pay Jefferson 75% of the sales price when it sold foreclosed properties without securing Jefferson's written consent.

The first is that it is inconsistent with the specific language that the Court used—language which, incidentally, Lifetime approved as to form [C. T. p. 211, lines 22-26]. If the District Court meant that Jefferson was to receive merely a pro rata share of the note when that note constituted the "net proceeds of sale", certainly it would have used a term such as "transfer" or "assign". It did not do so. Instead, it used the word "payment", and the conclusion that the word in this context contemplates money is inescapable. If the District Court was contemplating the possible situation in which Lifetime received both a note and cash and it was intended that the payment was to be of 75% of the cash only, presumably it would have so indicated by modifying "net proceeds" with an appropriate adjective, such as "any". No such modification is present.

Second, the term "net proceeds" was used *by Lifetime* to refer to the amount due to Jefferson on a *credit* sale of foreclosed property subject to the LPA. In a transaction related to and substantially contemporaneous with the sale of the five properties which are the subject of Count II, Lifetime sold—for an amount less than its and Jefferson's investment therein—three foreclosed properties subject to the LPA. The sole consideration which it received was a promissory note and deed of trust securing payment of the note [R. T. p.

73, lines 4-24; p. 117, line 25, to p. 119, line 7; Ex. 8]. Lifetime's remission of 75% of the sales price to Jefferson was accompanied by a statement [Ex. 14] which described the sales price (less certain costs and expenses of sale) as the "Net Proceeds" of the sale and the amount remitted to Jefferson as "75% of Net Proceeds". Hence, "75% of net proceeds" was, according to Lifetime's own terminology, 75% of the *selling price*.[2]

Finally, the construction of the "net proceeds" provision advanced by Lifetime would be anomalous in relation to other provisions of the LPA as interpreted by the District Court. The District Court delineated in great detail the rights and duties of Jefferson and Lifetime under the LPA. It expressly found that:

> "5. By virtue of the terms and provisions of the LPA and their respective status as tenants in common, *Lifetime must obtain the written consent of Jefferson* to the terms of sale before Lifetime can sell or otherwise dispose of any real property which had formerly secured the payment of any loan included within the LPA and which had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA." [C. T. p. 213, lines 13-19; emphasis added];

and that:

> "6. *In the event that Lifetime sells or otherwise disposes of any real property* which had for-

[2]Furthermore, this pay-off demonstrates that Appellee Lifetime interpreted the LPA precisely in the same way as the District Court interpreted it—that when Lifetime sold foreclosed properties subject to the LPA, whether for cash or credit, without Jefferson's written consent it was required to pay over to Jefferson its pro rata share of the net sales proceeds. Lifetime argued before the District Court that in making this payment to Jefferson, it was merely exercising its right under Paragraph 13 of the LPA to "repurchase" Jefferson's participation interest. [R. T. p. 474, line 21, to p. 478, line 14]. But if this was the case obviously such a "repurchase" would have to be at "book value"—not, as it was here, at a lower sale price.

merly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, *without the written consent of Jefferson, Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime.*" [C. T. p. 213, lines 20-26; emphasis added].

Yet under the construction of the District Court's judgment advanced by Lifetime, Lifetime's obligation to Jefferson would be precisely the same whether Lifetime secured Jefferson's written consent to the sale of foreclosed properties, as required by the LPA, or failed to do so. There is no question, as the District Court specifically found, that when Lifetime forecloses upon real estate subject to the LPA, Jefferson is a pro rata owner of the property thus acquired [C. T. p. 210, lines 15-19]; and that when Lifetime sells foreclosed property *with* Jefferson's consent, Jefferson is a pro rata owner of any note and deed of trust received therefor and entitled to share in the payments thereon [R. T. p. 480, lines 1-4; p. 489, lines 18-20]. Under Lifetime's view of the District Court's interpretation of the LPA, how would the rights and duties of the parties with respect to each other be any different when Lifetime sold the property *without* securing Jefferson's consent? Obviously not at all. If payment of 75% of "net proceeds" meant only that Jefferson should receive an assignment of a 75% interest in the note and deed of trust, it would mean nothing because Jefferson already has its pro rata share of the note and deed of trust. If it meant that Jefferson was to receive 75% of any cash received for the property, it would also mean nothing because Jefferson is entitled to that, too, regardless of whether it has consented to the sale.

2. Lifetime's Contention That the Interpretation Placed Upon the LPA by Lifetime Was to Operate Only in Futuro Is Plainly Erroneous.

Lifetime's argument that the Court's declaration as to the meaning of the LPA was intended to be confined to future transactions and not to the subject matter of Count II rests upon three bases: (1) that the Court's judgment on Count I uses the future tense; (2) that the findings and judgment on Count I are based upon the "particular facts" pertaining to the sale of the five properties which are the subject of Count II, and "these [facts] are not involved in Count I"; and (3) that Jefferson's counsel made statements indicating that he did not intend for the LPA, as interpreted by the Court, to be applicable to Count II (Appellee's Brief, pp. 6-8). Upon analysis, it becomes apparent that none of the foregoing, either individually or cumulatively, support Lifetime's position.

With respect to the point that the District Court used the future tense in Count I—a point on which it places primary emphasis—Jefferson respectfully submits that even if this was the case, the significance of such useage would be dubious. But the fact of the matter is that the District Court did not do so: the statement quoted by Lifetime as being in the future tense, " 'In the event that Lifetime sells or otherwise disposes of any real property . . .' ", is, in fact, clearly in the present tense.

So far as the court's reference to the "particular facts" in its findings and judgment on Count II is concerned, such a reference is irrelevant to the issue of whther the interpretation of the LPA in Count I is applicable to Count II. Count II was a claim for dam-

ages for breach of the LPA. Obviously, in order to adjudicate the claim it was necessary for the Court to find the "particular facts" to sustain it. Such findings would be required no matter what the court decided the LPA as it applied to Count II meant.

Actually, the findings reveal that the District Court did not exclude Count II from the application of the LPA as interpreted in Count I. In its judgment on Count I, the Court found:

> "6. In the event that Lifetime sells or otherwise disposes of any real property which had formerly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, without the written consent of Jefferson, Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime." [C. T. p. 213, lines 20-26].

In its findings with respect to the subject matter of Count II, the Court found:

> "14. On or after August 6, 1964, Lifetime, *without attempting to obtain or otherwise securing the consent of Jefferson*, also entered into a written agreement with David and Alberta Durham wherein Lifetime agreed to sell and convey to the Durhams five parcels of real property which had formerly secured the subject five (5) loans . . ." [C. T. p. 208, lines 11-15; emphasis added].

The absence of Jefferson's consent is relevant only because the Court in Count I found that a sale without such consent required Lifetime to pay off Jefferson.

Hence, not only do the findings fail to support Lifetime's position, they clearly controvert it.

Lastly, Lifetime relies upon a statement made by Jefferson's counsel which Lifetime characterizes as indicating that "Count I only pertains to the rights and duties of the parties in the future". (Appellee's Brief, p. 7).

Jefferson submits that Lifetime's description of the statement made by its counsel is misleading. At most, Jefferson's counsel indicated in its closing argument a recognition that the interpretation previously placed upon the LPA by the parties might not be binding as to future transactions—not, as Lifetime claims, that the interpretation placed upon the LPA by the Court was in no event to apply to Count II [R. T. p. 435, line 24, to p. 436, line 22]. In fact, Jefferson's counsel expressly indicated that the interpretation theretofore placed upon the LPA by the parties was proper, and was the interpretation which the Court should place upon it under Count I:

> "As your Honor will be able to tell from any argument, we are willing to accept the construction Lifetime placed upon the contract during the course of the contract, because that construction is the one and the same which we have always, Jefferson has always placed upon that contract." [R. T. p. 435, lines 18-23].

But even if Lifetime's characterization of the statement of counsel for Jefferson was accurate, it would still not support Lifetime's claim. What is controlling is not what either Lifetime's counsel or Jefferson's counsel *thought* the Court should decide; rather, it is

what the Court *did* decide. Here, it is evident from an examination of the findings and judgment that the Court decided that the LPA required Lifetime to secure Jefferson's written consent to the sale of foreclosed real estate; and when it failed to secure such consent, as it did with respect to the five properties involved in Count II, Jefferson was entitled to an immediate pay-off. The matter is as simple as that.

Consequently, the extensive argument which Appellee Lifetime devotes to controverting the interpretation placed upon the LPA by the District Court (Appellee's Brief, pp. 8-11) is irrelevant to the disposition of this appeal. If Lifetime felt that the District Court's judgment as to the interpretation of the LPA was incorrect, it should have appealed from that judgment. It did not do so. A reexamination on the appeal of the correctness of the District Court's interpretation of the LPA is therefore *foreclosed*. *Schildhaus v. Moe*, 319 F. 2d 587, 588 (2d Cir. 1963); *Hall v. Keller*, 180 F. 2d 753, 755 (5th Cir. 1950), cert den. 340 U.S. 818; *Blackhurst v. Johnson*, 72 F. 2d 644, 649 (8th Cir. 1934).

3. The Basis for the Action of the District Court in Awarding Jefferson Judgment on Count II Was Not an Estoppel Against Lifetime.

Lifetime apparently realizes that in order to give its position any credibility and avoid the fact that the basis for the decision of the District Court on Count II was breach of the LPA as interpreted in Count I, it must find an alternative basis for the Court's decision on Count II. The basis which it puts forth is estoppel: "[B]ecause of its conduct and statements to Jefferson with respect to the subject five properties, Lifetime has

become indebted to Jefferson in the amount of $23,-324.36 . . .". (Appellee's Brief, pp. 11-12).[3]

Perhaps the evidence before the District Court would have supported a judgment for Jefferson based upon estoppel. But to attribute the decision in favor of Jefferson on Count II actually reached by the Court to estoppel is only wishful thinking on Appellee's part. Estoppel was indeed involved in the Court's reasoning. But it was an estoppel *against Jefferson limiting Jefferson's recovery:*

> "By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, *Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties greater than 75% of $31,099.15, or $23,324.36.* Seventy-five percent (75%) of the sale price to the Durhams was $37,087.50 and 75% of the cost and expenses of that sale were approximately $325.85." [C. T. p. 209, lines 3-11; emphasis added].

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[3]Indicative of the weight placed upon the argument by Lifetime is its statement that "in order for it [Jefferson] to prevail in this appeal it must attack finding 16 of the Findings of Fact and Conclusions of Law which stated that Jefferson is deemed to have relied upon the statements made in Exhibit 11 in defining Lifetime's duties to it on the ground that there is not any substantial evidence to sustain it" (Appellee's Brief, p. 5). The statement is grossly misleading because, as indicated herein, it paraphrases only the first sentence of the finding and not the balance in which the District Court concluded that because of such reliance, *Jefferson* was estopped to claim more than the amount stated in the letter.

Hence, in Jefferson's view, the dispositive issue before the Court is whether in fact Jefferson is estopped to claim more than the $23,324.36 figure. The question is discussed at length in Jefferson's opening brief, at pages 13-19.

4. Jefferson Is Not Estopped to Contradict the Recital in Exhibit 11 That It Would Receive 75% of $31,099.15 by Reason of the Fact That It Introduced Exhibit 11 Into Evidence.

Lifetime, apparently recognizing the absurdity of estopping a party because of something upon which *that party* relied, attempts to base the estoppel upon the fact that Jefferson introduced into evidence the letter containing the "75% of $31,099.15" reference. It cites a number of California cases to support its contention that Jefferson is "bound" by the recital as to the amount of the indebtedness and cannot contradict it. The reference to California authority in this Court is rationalized with the statement that "the laws of the State of California were specified to be applicable to the interpretation of the LPA and to any right or liability arising under it." (Appellee's Brief, p. 12).

Appellants frankly have grave doubts that Lifetime's position would be well taken even under California law. Thus, in one of the very cases which Lifetime cites in support of its position, *Dodds v. Stellar,* 77 Cal. App. 2d 411, 419-420 (1946), the rule was not applied. The Court in *Dodds* said:

> "Appellant invokes the rule that a party is bound by the recitals of documentary evidence introduced by him. [Citations] He then proceeds to demonstrate that certain statements in the work 'X-rays

and Radium in the Treatment of the Skin,' by McKee, introduced in evidence by respondent, are inconsistent with the diagnoses of the witnesses. The elaborate argument to illustrate the hopelessness of respondent's position by showing the inconsistencies between McKee's discussion of the symptoms of a third degree X-ray burn and the medical testimony is interesting but not convincing. *It was the privilege if not the duty of respondent's counsel to offer in evidence the entire McKee volume at the time of reading any part of it.* Conceding, arguendo, that it contains language contradictory of the expert witnesses, it is a rule governing appeals that where there is a conflict between the witnesses presented by a party or any inconsistency between his living witnesses and his documents, or between inferences drawn from the facts proved by either, the jury are at liberty to chose the writing or the witness or the inference upon which they will base their finding."

But in any event, the California rule is inapplicable to this case. A federal court is not required to apply state rules of procedure in a diversity case. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). A rule is procedural when it merely regulates the means by which the rights of the parties to the litigation are ascertained. *Guarantee Trust Co. of New York v. York,* 326 U.S. 99, 109 (1945). Under this criteria, whether or not a party is bound by the recitals in a document which he introduces is obviously a matter of procedure.[4]

[4]It is true, of course, that a federal court may look to state rules of procedure for guidance. But here it is clearly inap-

(This footnote is continued on the next page)

The recent opinion of this Court in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F. 2d 653, 666 (9th Cir. 1965), *cert. den.* 382 U.S. 817, would seem to be a complete answer to Lifetime's contention that Jefferson is irrevocably "bound" by the recital in Exhibit 11 as to the amount that Jefferson would receive:

> "In making its case the plaintiff introduced voluminous correspondence and other documents exchanged by or written by the defendants or some of the persons collaborating with them. Some portions of this correspondence contained statements contrary to the allegations of the plaintiff's complaint, and the contentions made by it in pretrial order. It is contended that because this evidence was offered by the plaintiff these various contradictory statements are binding upon the plaintiff. *We know of no such rule. To the extent that documents originally designed to serve the defendants and their purposes also contain statements which support the claims of the plaintiff, the plaintiff may rely thereon without having to accept as verity all that appears in such documents.*"

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propriate to do so. The rule that a party is "bound" by recitals in documents which he introduces is a corollary of the doctrine that a party vouches for the credibility of his witnesses and therefore may not impeach them. That doctrine has little in the way of reason to commend it. As stated by the Third Circuit in *Johnson v. Baltimore & O. R. Co.*, 208 F. 2d 633, 635, quoting from 3 Wigmore on Evidence, 383, 389 (3d Ed. 1940), " 'There is no substantial reason for preserving this rule [that a party may not impeach his witness],—the remnant of a primitive notion.' " It is totally incompatible with the philosophy of the Federal Rules of Civil Procedure which, as evidenced by Rule 43, condemns artificial impediments to the ascertainment of truth. Furthermore, California itself has manifested its dissatisfaction with the doctrine by abolishing it. Under § 785 of the Evidence Code which became effective January 1, 1967, "The credibility of a witness may be attacked or supported by any party *including the party calling him.*" (Emphasis added).

The appellee here is making precisely the same argument that this Court rejected in the *Jerrold Electronics* case. It is contending that Jefferson is estopped to question the recital in a document originally designed to serve the defendant's purposes because it introduced that document into evidence. This Court has found that argument untenable.

It is clear that at no time did Jefferson accept the $31,099.15 figure as correct. The figure as it appears on Exhibit 11 is circled and marked with a question mark [Ex. 11]. Jefferson prayed in its complaint for damages of $37,087.50, which is 75% of the selling price of the properties less Jefferson's pro rata share of the costs and expenses of sale [C. T. p. 6, lines 14-16]. At the trial it introduced evidence of prior transactions which showed that 75% of the selling price was the proper measure of its recovery under Count II [Ex. 14]. Lifetime's own counsel recognized that Jefferson was not seeking a recovery of $31,099.15 but, rather of $37,087.50 [R. T. p. 492, lines 13-17].

5. Whether or Not Jefferson Will Realize a "Profit" on the Sale of the Different Properties Subject to Count II Is Irrelevant.

Lifetime devotes the last two pages of its brief to showing that Jefferson will make a "profit" with respect to the subject matter of Count II if it is awarded the recovery which it claims (Appellee's Brief, pp. 15-16).

Jefferson submits that what it is seeking here is its rights under the terms of the LPA. Whether those

rights mean that Jefferson will receive an amount in excess of its investment or an amount less than its investment is immaterial. Lifetime had no qualms about paying Jefferson an amount less than its investment in foreclosed properties subject to the LPA when the sales price was less than the amount of the investment [Ex. 14]. Neither should it object to paying Jefferson an amount more than its investment when the sales price is more than the investment.[5]

Indeed, if there is any element of unconscionability or overreaching with regard to the LPA, it is on the part of Lifetime. Despite the fact that the loans in which Jefferson purchased a participating interest bore interest at rates varying from 7.2% to 7.8%, Jefferson's rate of return was limited to 6.5%. The difference between the 6.5% and the actual rate of interest went to Lifetime even though Lifetime had only a 25% interest in the loan. [C. T. pp. 7-11]. As a result, Lifetime's rate of return on its investment was in excess of 11%.[6] In addition, Lifetime received all late charges, all of certain miscellaneous fees, and an additional fee of 5% on all rentals collected by Lifetime on the mortgaged premises.

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[5]Under the terms of the sale there was a lower "short term" price and a higher "long term" price, depending on the time that the buyers took to pay off their loan (Appellee's Opening Brief, pp. 6-7). Jefferson is claiming only the lower "short term" price.

[6]A calculation based upon Exhibit 14 reveals that the total unpaid principal balance on the loans subject to the LPA was $477,657.22. The total annual interest on this sum was $37,015.91, of which Jefferson, for its $358,242.92 share, received $23,285.79 while the balance, $13,730.12, went to Lifetime for its $119,408.30 share.

III.
CONCLUSION.

It is evident that the District Court was in error in limiting Jefferson's recovery under Count II to $31,-099.15. This Court should amend the judgment to increase Jefferson's award to the amount provided for by the LPA, 75% of the net sales proceeds of the five properties in question.

Respectfully submitted,

McKenna & Fitting,
By Aaron M. Peck,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

AARON M. PECK